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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1990

AMERICAN SOCIETY OF PLASTIC AND RECONSTRUCTIVE SURGEONS, INC. AND ROBERT M. GOLDWYN, M.D.,

Petitioners,

v.

CELIA ANDERSON,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UTAH SUPREME COURT

RESPONDENT'S SUPPLEMENTAL BRIEF IN RESPONSE TO BRIEF OF AMICI CURIAE

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STATEMENT OF FACTS

Respondent does not wish to burden the court by restating the facts in this case. Respondent's version of the critical facts is set forth in her Brief in Opposition to Petition for Writ of Certiorari at 1-6 (hereinafter "opposition brief"). The Utah Supreme Court recognized that the cricial factual issues upon which a determination of the jurisdictional issues depend, are in dispute. *See, Anderson v. American Society of Plastic and Reconstructive Surgeons*, 807 P.2d 825 (Utah 1990).

REASONS FOR DENYING CERTIORARI

The Utah Supreme court has not ruled that the contacts of Dr. Goldwyn and the ASPRS are sufficient to support *in personam* jurisdiction in Utah. The Utah Supreme Court only ruled that the facts which determine the jurisdictional issues are the same facts which determine the merits of Celia Anderson's claims against the ASPRS and Dr. Goldwyn. Therefore, the factual disputes related to jurisdiction will be determined at the same time as the factual issues on liability. Because the opinion of the Utah Supreme Court in *Anderson, supra*, does not finally determine the jurisdiction issue, but merely remands the case for a determination of the factual issues at trial, there is no reason to grant certiorari at this time.

ARGUMENT

I. THE UTAH SUPREME COURT PROPERLY DETERMINED THAT THE DISTRICT COURT HAS JURISDICTION TO DETERMINE ITS JURISDICTION BY PROCEEDING TO A DECISION ON THE MERITS

This Court's decision in *Land v. Dollar*, 330 U.S. 731 (1947) controls this case. *Land v. Dollar* holds that when the question of jurisdiction is interwined with the merits of the plaintiff's claim, a trial on the merits is a proper method for determining the question of jurisdiction. In *Land*, this Court stated:

> We intimate no opinion on the merits of the controversy. We only hold that the district court has jurisdiction to determine its jurisdiction by proceeding to a decision on the merits.

330 U.S. at 739.

Certiorari should be denied unless this Court wishes to revisit *Land v. Dollar* and overrule its holding.

II. THE LEGAL ISSUES RAISED BY AMICI CURIAE ARE NOT PROPERLY BEFORE THE COURT

Amici has argued to this Court that:

> *Amici's* interest in this case is to provide the Court with certain information regarding the conduct of clinical trials and to share with the Court their understanding of the practical implications for national health care policy of the Utah Supreme Court's ruling. The Utah Supreme Court's decision to exercise jurisdiction over petitioners American

> Society of Plastic and Reconstructive Surgeons ("ASPRS") and Dr. Goldwyn, based solely on their involvement in a national, multistate clinical trial, is unreasonable because it will discourage medical specialty societies, physicians, dentists, and other health care providers from participating in critically important clinical investigations, thereby retarding the progress of medical and dental research.
>
> The Utah decision will also limit patients' access to interstate health care services, particularly specialized procedures, by discouraging health care providers from treating out-of-state patients. By failing to consider or give meaningful weight to this effect, the decision below conflicts with the decisions of the majority of lower federal and state courts that have been asked to exercise personal jurisdiction over a nonresident physician, dentist, or other health care provider in a malpractice action.
>
> *Amici* therefore seek to demonstrate that the public interest requires that the petition be granted so that this Court may address the issues of national importance raised by the Utah decision and reconcile a significant conflict among the lower courts in their interpretation of the limits of the Due Process Clause.

Brief of *Amici Curiae* at 1-2 (hereinafter "*Amici* Brief").

The problem with the *amici* argument is that the issue briefed by *amici* is not before this court. The whole of the *amici* argument presupposes that the Utah Supreme Court has held that Goldwyn and the ASPRS are in fact subject to jurisdiction of the Utah courts "based solely on their

involvement in a national, multistate clinical trial." *See*, *Amici* Brief, *supra* at 1.

However, the Utah Supreme Court merely ruled that personal jurisdiction depends upon facts which were in dispute and which must be determined at trial. *See*, opposition brief, *supra* at 9-10. Whether Goldwyn and the ASPRS caused damage to Celia Anderson in Utah is a hotly contested fact issue. A jury will decide whose version of the facts is correct. The nature and extent of Goldwyn's and the ASPRS's activities in Utah will also be decided by a jury.

Once the jury has determined these factual issues, the trial court can then apply due process principles and determine if personal jurisdiction is proper in this case. As stated by the Utah court, the facts which determine jurisdiction are also the facts which determine liability. *Anderson*, 807 P.2d at 825.

The Utah Supreme Court did not determine the ultimate jurisdictional question. It remanded the case for trial on the jurisdictional question. *Id.* The only issue subject to review is whether it was proper to remand the case for determination of the jurisdictional issue at trial.

CONCLUSION

The decision of the Utah Supreme Court that the jurisdiction question must be determined at trial is squarely in line

with this Court's holding in *Land v. Dollar*, *supra*. This Court has historically allowed the question of jurisdiction to be determined at trial when the same factual issues determine both liability and jurisdiction. Therefore, unless this Court intends to revisit and overrule *Land v. Dollar*, *supra*, the Petition for Writ of Certiorari should be denied.

Respectfully Submitted,

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